IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
and
HONORABLE DAMON J. KEITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The filing of this brief as amicus curiae has been consented to by all the parties under Rule 42(2) of the Supreme Court Rules.

INTEREST OF AMICUS

The UAW is an industrial union which, as of November 1971, represents more than 1,350,000 workers in the automobile, agricultural implement, aerospace, and other industries in North America. Of this number nearly 1,234,000 members and their families are citizens of the United States, and as such are vitally interested in the preservation of their constitutional liberties.

The UAW has a long tradition of defending the civil liberties of not only our members but all Americans. We realize that the union is the first victim of authoritarianism, and that genuine unionism can flourish only in a democratic atmosphere where the rights of the individual are given the high priority they deserve. Our past actions and our convention resolutions attest this commitment.[1]

But besides this devotion to civil liberties, the UAW has a particular interest in the issues presented by the instant case. The UAW and its members know from bitter experi-

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[1] As the late Walter Reuther put it in "UAW: Past, Present and Future," 50 U. Va. L. Rev. 58, 98 (1964):

> "The UAW attempts to defend the civil liberties of our members and all Americans. Our financial support of civil liberties' organizations and our convention resolution make this abundantly clear. For instance, we were among the first to raise our voices against McCarthyism, against which the racist formula of the McCarran-Walter immigration law, and against the second class citizenship forced upon the Negro in America. As participants in the labor movement, we realize that the free trade union is the first victim of any dictatorship and that genuine unionism can flourish only in a democratic atmosphere where the rights of the individual are given top priority."

ence what it is to be spied upon.[2] In the not-too-distant past, political and economic opponents were labeling the UAW "subversive," "dangerous," and a "threat to national security;" then using these labels as an excuse to ride roughshod over our precious civil liberties.[3] Because of this experience the UAW is uniquely well aware of the serious threat to our civil liberties posed by the government's position in this case. Present officers of the UAW have lived through surveillance and other denials of basic rights. They know full well that the activities of the Justice Department in this case have a chilling effect on the First Amendment

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[2] Jerold S. Auerbach, LABOR AND LIBERTY: THE LaFOLLETTE COMMITTEE AND THE NEW DEAL (Bobbs Merrill ed, 1966) at 99:

> "The history of organization efforts by automobile workers in Flint, Michigan, presented a paradigm of the destructiveness of industrial espionage. In 1934 the Federal Union of Automobile Workers boasted 26,000 members in General Motors plants in that city. *But of thirteen members of the union's executive board at least three were spies;* one served as chairman of the organizing committee, and another represented the local at a convention where plans for new organizing drives were formulated. Within two years membership in the Flint local fell to 120. When UAW organizers came to Flint they found workers who were afraid to participate in overt union activities. Clandestine meetings were held at night with the lights out, for the frightened men were unwilling to risk being identified. The LaFollette Committee concluded that through espionage 'private corporations dominate their employees, deny them their constitutional rights, promote disorder and disharmony, and even set at naught the powers of the Government itself.'" (emphasis added).

See also: *Federal Bearings Co.*, 4 NLRB 467, 471 (1937); *Highway Trailer Co.*, 3 NLRB 591, 607, (1937), enf'd *per curiam*, 95 F. 2d 1012 (CA 7, 1938); and *Reuther*, op. cit., 50 U. Va. L. Rev. 58, 59-63; and generally, U.S. Senate, Committee on Education and Labor, INDUSTRIAL ESPIONAGE, Report No. 46, 75th Congress, 2d Session, 1937.

[3] "Employers and detective agency officials advanced several justifications for espionage: protection against radicalism, prevention of sabotage, detection of theft." Auerbach, *op. cit.*, at 99.

rights of the members of the UAW.[2a] We submit that we are in a position to help this Court more realistically to evaluate the true dangers of the government's position. And we fear that, unless those dangers are fully appreciated, the UAW and Americans generally may yet be forced to repeat some of the saddest chapters in this nation's history.

For these reasons, the International Union, UAW files this brief as *amicus curiae* in support of respondents.

QUESTIONS PRESENTED

1. Is the Fourth Amendment violated by electronic surveillance specifically authorized by the President, acting through the Attorney General, to gather intelligence information which the Executive branch deems necessary to protect against attempts to overthrow the government by force or other unlawful means, or against other clear and present dangers to the government's structure or existence?

2. If such national security surveillance is unlawful, would it nevertheless be appropriate for a federal district court in a criminal prosecution to determine *in camera* whether the interceptions are arguably relevant to the prosecution before requiring their disclosure to defendant?

[2a] We submit that the UAW is not alone in its apprehension. The AFL-CIO recently expressed a similar view in its resolution abhorring the unrestricted use of the wiretap.

SUMMARY OF ARGUMENT

Stripped to its basics the government is claiming that in the area characterized as "threats to national security" the Executive may, while exempt from any meaningful safeguards, tap or electronically bug whomever they see fit. Electronic surveillance is dragnet in character, and its uncontrolled use poses a clear threat to constitutional rights. Nevertheless, the government seeks exemption from any meaningful safeguards.

They would avoid normal Fourth Amendment safeguards by arguing that "national security" surveillances are really administrative searches, subject only to a balancing test for reasonableness, and that these searches fit within the foreign intelligence exception to the Fourth Amendment. But reliance on the balancing test of the administrative search area is misplaced. Here we are dealing with Constitutional rights, not administrative regulation. Moreover, the Fourth Amendment safeguards are particulary important in this case. The history of the Fourth Amendment clearly shows that it was designed to protect a citizen's right of free speech from government suspicions of subversion and disloyalty. To argue as Petitioner does here, that *because* subversion may be involved this case is exempt from Fourth Amendment protections, is to turn the purpose of the Fourth Amendment on its head. Thus, this surveillance must be *presumed* arbitrary and unreasonable. Because basic liberties are involved, the government bears a heavy burden to show the surveillances both well justified and thoroughly safeguarded.

Nor may the government bootstrap itself into the foreign intelligence exception with unsubstantiated insinuations.

The government insinuates that domestic radicals are so "interrelated" with foreign intelligence operations as to deserve identical treatment. Again the government seeks to judge its own case. They offer neither clear evidence nor independent judgment of such involvement. Further, even if they could show such "interrelation", this case does not fall within the foreign intelligence exception. Here the Executive seeks in peacetime to unilaterally decide that domestic organizations of United States civilians are exempt from the protections of the Fourth Amendment. Nor does past practice under the *Olmstead* line of cases establish the constitutional permissibility of these surveillances now that *Katz* has overruled *Olmstead*.

No other meaningful safeguards have been suggested by Petitioner. Approval by the Attorney General offers no protection because he is an interested party. The possible answerability of the Attorney General, through the President, to the People is no protection because the People will have no information about these surveillances; and because the Fourth Amendment was conceived precisely as a safeguard against answerability to the People on matters of basic liberties. After-the-fact judicial review for arbitrariness is no protection because the standard is weak and the government controls the information.

In the absence of meaningful safeguards, the danger of abuse is intolerable. *If one category exists practically and legally immune from scrutiny or control, no other area can be safe.* It will be easy to fit troublesome opponents within the privileged area, especially if it is as inherently vague as "threat to national security."

The technological sophistication of modern eavesdropping itself raises doubts about the ability of even the Attorney General, who is trained as a lawyer, to detect or control

abuse of surveillance. Recent history gives little reason for optimism. As the Martin Luther King case shows, the F.B.I. has wilfully disregarded the requirement of prior Attorney General approval. The King experience also shows that the Attorney General has no trouble eavesdropping on any prominent American, whatever his political persuasion, in the interests of "national security." Even the government's own brief is ample evidence of the danger of abuse, absent Fourth Amendment safeguards. The government shows an inability to fully appreciate the difference between what is the case and what ought to be the case. To lack this ability is to lack the conceptual apparatus needed to recognize when an existing policy is unconstitutional, thus the ability to spot abuses. Again, consider the government's attempt to rely on past practice since *Olmstead* has been overruled, this practice only amounts to a construction of §605 of the Communications Act. Thus, the government is trying to create a constitutional exception from a statutory construction. Further expansion should be simplicity itself.

The only hope of preventing and controlling abuse is to adhere to Fourth Amendment safeguards. Although control may be difficult, the Constitution requires that we try. Adherence to safeguards does not deny the authority of the Attorney General to defend society, it merely controls the methods he uses. The government cannot argue that the judiciary is incapable of prior review of surveillances. It is presumptuous and contrary to the whole thrust of the Fourth Amendment to tell judicial officers they lack the ability to handle complicated cases. Nor can the government argue that *in camera* proceedings are an adequate substitute for disclosure under *Alderman*. The very considerations which Mr. Justice White stressed as requiring disclosure are present here, as the government's brief shows. *Alderman* is not an exercise of supervisory powers.

The Palmer Raid period provides a clear example of history the government would doom us to repeat. Some years before the raids of 1919-20 this Court gave the government an area within which "administrative procedures" would be totally exempt from the safeguards of the Bill of Rights; deportations of resident aliens. There were standards to prevent abuse, but those standards were applied by the Executive. There was after-the-fact judicial review for arbitrariness. The national security was purportedly being protected against the I.W.W., a domestic dissident organization. As the I.W.W. was thought to be "interrelated" with foreign enemies, it became fair game for unrestricted espionage. Warrantless, dragnet searches, mass arrests and *incommunicado* interrogation became the order of the day. Finally, under pressure from men like Felix Frankfurter, the President brought his subordinates (including J. Edgar Hoover, head of the Justice Department's General Intelligence Division) to heel.

INTRODUCTION

This brief will focus on the potential for abuse inherent in the government's position. Our purpose is not to discuss every aspect of the questions presented in exhaustive detail. Rather, it is to help this Court more fully to appreciate the grave threat to our basic liberties raised by the government's claims.

ARGUMENT

I.

THE GOVERNMENT IS CLAIMING AN AREA WITHIN WHICH THE EXECUTIVE MAY, WITHOUT ANY MEANINGFUL SAFEGUARDS, EAVESDROP ELECTRONICALLY ON WHOMEVER THEY SEE FIT.

Stripped to its basics the government is claiming that in the area vaguely characterized as "threats to national security" the Executive may, while exempt from any meaningful safeguards, tap or electronically bug whomever they see fit. In effect, what is being claimed is an area within which the government will be totally privileged, practically and legally immune from any effective scrutiny or control.

A. Unrestricted Electronic Surveillance Poses a Clear Threat to Constitutional Rights.

The serious threat which indiscriminate eavesdropping, whether by tap or electronic bug, poses to basic constitutional liberties has been frequently stressed. As Mr. Justice Douglas has put it:[4]

> "Wire tapping, wherever used, has a black record. The invasion of privacy is ominous. It is dragnet in character, recording everything that is said, by the innocent as well as by the guilty. It ransacks

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[4] Wm. O. Douglas, AN ALMANAC OF LIBERTY (Doubleday ed., 1954), at 355. See also: H. Schwartz, "The Legitimization of Electronic Eavesdropping: The Politics of 'Law and Order,'" 67 Mich. L. Rev. 455 (1969); Mr. Justice Brandeis, dissenting in *Olmstead vs U.S.*, 277 U.S. 438, 478 (1928); "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping".

> their private lives, overhears their confessions, and probes their innermost secrets. It is specially severe in labor espionage, in loyalty investigations, in probes to find out what people think."

In *Berger v. New York*, 388 U.S. 41, 55-56 (1967), this Court wrote:

> "By its very nature eavesdropping involves an intrusion on privacy which is broad in scope. As was said in *Osborn v. United States*, 385 U.S. 323 (1966), the 'indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth . . . Amendment . . . and imposes a heavier responsibility on this court in its supervision of the fairness of procedures . . .' at 329, n. 7."

It is, we submit, safe to assume that in the four years since Mr. Justice Clark wrote these words electronic eavsedropping has become even more sophisticated, even more "dragnet in character," even more of a threat to constitutional rights. Thus, the law enforcement agencies who use eavesdropping, and the courts who supervise its use bear an even heavier responsibility to show that such activities are both well justified and thoroughly safeguarded against abuse.

B. The Government Claims an Exemption from any Meaningful Safeguards.

1. THE GOVERMENT SEEKS TO AVOID NORMAL FOURTH AMENMENT SAFEGUARDS.

There are two safeguards normally used to protect fourth amendment rights: prior judicial approval, and disclosure under *Alderman v. United States*, 394 U.S. 165 (1969). The government seeks to avoid these safeguards by the related arguments: (1) that "national security" surveillances are

really administrative searches, subject only to a balancing test if they are neither arbitrary nor capricious;[5] and (2) that surveillance of individuals who, like defendant Plamondon, are thought dangerous to the national security fits within the foreign intelligence exception to the Fourth Amendment.[6]

a. But Reliance on the Balancing Test of the Administrative Search Area is Misplaced.

This Court need not be reminded that the government of the United States is one of limited powers. The Bill of Rights was designed precisely to ensure that the federal government's powers over the people remained limited. The warrant requirement of the Fourth Amendment was designed to provide a judicial safeguard against the abrogation of power by the Executive branch. *Boyd v. United States,* 116 U.S. 616 (1885).

The wisdom of this approach is clear. "If men were angels," it was said long ago in the *Federalist,* "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; *but experience has taught mankind the necessity of auxiliary precautions.*"[7]

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[5] Brief of the United States, p. 6.

[6] Brief of the United States, p. 7.

[7] *Federalist,* No. 51 (Madison).

The "auxiliary precaution" at issue here is no mere rule of convenience. Here we are dealing with the Fourth Amendment. Convenience and inconvenience, efficiency and inefficiency are not to the point. As Mr. Justice Douglas put it:[8]

> "Wire tapping, it is said, is essential or important in detection of crime. The use of torture is also effective in getting confessions from suspects. But a civilized society does not sanction it. Wire tapping may catch criminals who might otherwise escape. *But a degree of inefficiency is a price we necessarily pay for a civilized, decent society.* The free state offers what a police state denies—the privacy of the home, the dignity and peace of mind of the individual. That precious right to be let alone is violated once the police enter our conversations." (emphasis supplied).

These sentiments were reaffirmed in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In language particularly relevant to the instant case, this Court said, 403 U.S. 443, 455:

> "In times of unrest, whether caused by crime or racial conflict or *fear of internal subversion*, this basic law and *the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.* In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution of this continent—*a right of personal security against arbitrary intrusions by official power.* If times have

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[8] Wm. O. Douglas, *op. cit.*, at 354. "We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all powerful police." Douglas, J., dissenting in *United States v. Carignan*, 342 U.S. 36, 46 (1951).

changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important." (emphasis added).

If a government of limited powers and our Fourth Amendment safeguards mean anything, they mean that the *government bears the burden* of thoroughly justifying any intrusion on the citizen's privacy, and of establishing the existence of sound safeguards against abuse. To begin their discussion, as the government does,[9] from the assumption that our basic freedoms are to be weighed, as so much hamburger, against the efficiencies of hunting subversives, is to fly in the teeth of both history and the pronouncements of this Court. The history of the Fourth Amendment shows that it was designed to protect individual rights against arbitrary intrusions of official power, *particularly* when those intrusions are made in the name of preventing subversion and disloyalty. The issue is *not* whether they may spy upon suspect citizens until someone shows the spying to be, on balance, unreasonable. Rather, the point is that spying on any citizen, suspect or not, is unreasonable unless and until the government can establish the contra

The constitutional presumption against searches and seizures is particularly strong when First Amendment rights are endangered, as they are here, *Stanford v. Texas*, 379 U.S. 476 (1965), per Stewart, J. Plamondon and his associates are, to say the least, politically opposed to the current Administration.[10] Of course, a defendant's political

[9] Brief of the United States, pp. 5-6.

[10] The government admits as much. Attorney General Mitchell's affidavit states that the surveillance in question here was "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." (Brief of the United States, p. 3).

beliefs are irrelevant in a criminal trial. But the issue here is the legality of the tactics used against a criminal defendant. The fact that defendant Plamondon is also a political opponent of the current Administration should bring to mind Judge Learned Hand's warning, *United States v. Kirschenblatt*, 16 F. 2d 202, 203 (CA 2, 1926):

> "Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

Whether or not the criminal case against defendant Plamondon was brought in order to suppress political opposition, the mere *danger* can only reinforce the constitutional presumption against surveillance. For, as Mr. Justice Brennan's exhaustive historical discussion in *Marcus v. Search Warrant*, 367 U.S. 717, 724-29 (1961) shows, the limits which the Fourth Amendment places on the *discretion* of officers is to the defense of freedom of expression and association, 367 U.S. at 729:

> "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression *inhered in the discretion* confided in the officers authorized to exercise the power." (emphasis supplied).

If dissenters know that officers have the unrestricted discretion to eavesdrop whenever they care to, then fear alone will stiffle free expression. Widespread surveillance never

really need be undertaken. A few episodes will get the message across a very effectively chilling dissent.[11]

Against this background, it becomes clear that the eavesdropping in question here cannot even begin to be classified as an administrative search. This Court has restricted warrantless administrative searches to situations where the factual setting makes it obvious that adequate safeguards are present to prevent significant intrusions upon the interests protected by the Fourth Amendment. Generally, such searches are a necessary part of some regulatory scheme having little or nothing to do with the prevention of criminal activities.

Thus, in *Wyman v. James*, 27 L.ed.2d 408 (1971), Mr. Justice Blackmun was careful to point out that (a) Ms. James consented to the search, (b) that she was not compelled to consent to the search, (c) that home visits were necessary to the proper administration of the A.F.D.C. program, and (d) that the "home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding" 27 L.ed 2d at 417. The search and seizure in question here is not remotely similar. As defendant Plamondon was unaware of the surveillance, he had no way to refuse consent. Indeed, the whole notion of consent is meaningless in the surveillance context. While Ms. James could protect her privacy, Plamondon could not. While this surveillance

[11] For this reason, the government's assurance that "very few" national security surveillances are actually undertaken (Brief of the United States, p. 27, n. 10) misses the point. In the First Amendment area, even a few are too many. Moreover, it should be noted that the government only gives us information on *telephone* surveillances. It is altogether possible that the reason the number of telephone surveillances is declining is that such surveillances have become technologically outmoded in the last ten years. For aught we know the total number of electronic surveillances may have increased dramatically.

may not have been originally directed at Plamondon, it certainly "equates" with a criminal investigation. On the government's own showing, this surveillance was needed to prevent bombings and other "covert", terrorist tactics to destroy and subvert the government.[12] Bombing, the use of terrorist tactics, conspiracy to do either, being an unregistered agent of a foreign power—these are all criminal under the laws of the United States or the several states. It must then follow that this surveillance was part of a criminal investigation. However, if this surveillance was not a necessary part of an effort to investigate and prevent these crimes, the government ought to favor this Court with an explanation of why such warrantless eavesdropping is so essential to protecting our national security. Either these surveillances are part of criminal investigations or they are not. If they are, then perhaps they are important to national security; but they are certainly not administrative searches.

In either event, the government seeks to use this particular surveillance "in aid of" a criminal proceeding. The protestation that "the Attorney General is gathering intelligence information for the President," rather than "obtaining evidence for use in a criminal prosecution,"[13] has a doubly hollow ring. First, as we have shown, the information in which the President is interested is information of criminal activities for which there will presumably be subsequent criminal prosecution.[14] Second, even if this

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[12] Brief of the United States, pp. 18-19.

[13] Brief of the United States, p. 19.

[14] This vitiates the government's attempt to distinguish *Coolidge v. New Hampshire*, on the ground that the warrant there was issued to obtain information for a subsequent criminal prosecution, Brief of the United States, p. 19, n. 8. Here, the purpose of the surveillance was also to obtain information for subsequent criminal prosecution. Of course, it is logically possible that the government intended to stop the feared conspiracies, bombings and "terrorist tactics" by some other means than criminal prosecution and trial by jury. By *what* other means, we leave to the Court's imagination.

information were gathered for some "neutral" administrative reason, the government now seeks to use the information in a criminal proceeding.

In *Camara v. Municipal Court*, 387 U.S. 523 (1957), the administrative search case on which the government so strongly relies,[15] this Court, per Mr. Justice White, was equally careful to point out that the building inspection in question involved, 387 U.S. at 534:

> "... significant intrusions upon the interests protected by the Fourth Amendment ... [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual."

Consequently, this Court held that prior judicial approval of the search was required. It is, moreover, interesting to note that Mr. Camara came to this Court seeking to prevent state criminal action against him.[16]

In short, neither *Camara* nor anything else in our history, constitution, and case law justifies the government's reliance on the balancing test in this case.

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[15] Brief of the United States, pp. 13, 23-4.

[16] Similarly, in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), this Court held a warrantless, forcible search for liquor illegal. In dissent, Burger, C.J., and Stewart, J., emphasized that a large liquor store could easily afford the $500 fine for refusal to allow inspection, and thereby safeguard the privacy of its storeroom.

b. The Government's Attempt by a Balancing Test to take this Case out of the Warrant Requirement would Render Fourth Amendment Guarantees Illusory by Allowing the Government to Judge its own Case where the Courts are Perfectly Competent.

As we have shown a balancing test may not be applied to the warrant requirement in this case, and thus no balancing may be conceived of, which can exempt the government from the warrant requirement here. The government's argument to the contrary perverts both the history of the Fourth Amendment and the case law. But even assuming, *arguendo*, that a balancing test is appropriate, to strike the balance in the government's favor here would render the Fourth Amendment a nullity.

What vital needs would the government have this Court put on their side of the balance? They suggest the following needs: to prevent bombings of government and other facilities;[17] to prevent other "terrorist activities";[18] to prevent disclosure of information which, by their nature, are highly confidential and must remain secret;[19] to prevent danger to the lives of informants and agents;[20] to maintain uniform standards;[21] to protect the government's ability to obtain vital information relating to national security, and prevent potential dangers to national security.[22]

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[17] Brief of the United States, p. 18, n. 7.

[18] Brief of the United States, p. 18.

[19] Brief of the United States, p. 24; and p. 34, "whose very nature requires that they not be made public."

[20] Brief of the United States, p. 24.

[21] Brief of the United States, p. 27.

[22] Brief of the United States, p. 24.

But a closer look at this array reveals that, with one exception, each of these considerations is based on information exclusively within the government's possession, or conclusory, or both. Only the government is in a position to evaluate the threat of unspecified terrorist activities. Only the government can evaluate whatever it is in some information's nature that makes its highly confidential,[23] or *why it must remain secret*. Only the government knows who its informants and agents are, let alone what dangers may threaten them. Of course, we may speculate on the effect a lack of uniformity may have on national security surveillance; but (if the government prevails) no one but the Executive branch will ever know anything about these surveillances, much less whether their effectiveness is improved by the uniform standard imposed by successive Attorneys General. On all these points, the government is attempting to judge its own case.

The bald assertion that there is a need to protect the ability to obtain information relating to national security, and to prevent dangers to national security, adds nothing. Everyone admits these needs. But the statement that such needs exist, without more, tells us nothing about *why* granting the government's claims in cases like this one will fulfill such needs. These are mere conclusory assertions.

On one point we are given independent information—the need to prevent bombings. However, the government never shows why it is that, say, a special warrant under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*, would make it any more difficult to

[23] One is reminded of the ancient explanation of why objects fell. It was in their nature, we were solemnly told, to seek the earth.

prevent bombings.[24] Even with the information supplied by a warrantless surveillance, the C.I.A. office in Ann Arbor was still bombed.

The Fourth Amendment requires not only evidence from which reasonable inferences can be drawn, but also that those inferences be drawn by a neutral and detached magistrate. As Mr. Justice Stewart put it in *Coolidge v. New Hampshire*, 20 L.ed.2d, 564, 573 (1971):[25]

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[24] The absence of such a showing moves one to wonder if the Attorney General may not be over-estimating the danger which domestic dissidents actually pose to national security. One is reminded of Charles Dickens' description of the Coketowners in HARD TIMES (1854 ed.):

> "Surely there never was such fragile chinaware as that of which the millers of Coketown were made. Handle them ever so lightly and thel fell to pieces with such ease that you might suspect them of having been flawed before. They were ruined when they were required to send laboring children to school; they were ruined when inspectors were appointed to look into their works; they were ruined when such inspectors considered it doubtful whether they were quite justified in chopping people up with their machinery; they were utterly undone when it was hinted that perhaps they need not always make quite so much smoke. Whenever a Coketowner felt he was ill-used—that is to say, whenever he was not left entirely alone, and it was proposed to hold him accountable for the consequences of ay of his acts—he was sure to come out with the awful menace that he would 'sooner pitch his property into the Atlantic.' This had terrified the Home Secretary within an inch of his life on several occasions. However, the Coketowners were so patriotic after all, that they never had pitched their property into the Atlantic yet, but on the contrary, had been kind enough to take mightly good care of it. So there it was in the haze yonder, and it increased and multiplied."

[25] Quoting Mr. Justice Jackson in *Johnson v. U.S.*, 333 U.S. 10, 13-14 (1948). "The right of privacy is deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald v. United States*, 335 U.S. 451, 455-6 (1948).

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

Here, the government neither offers independent information from which the need to perform these surveillances can reasonably be inferred; nor would they allow an independent magistrate make the required inferences. Nor, as we show below at pages 43-44, is there any reason to believe the judiciary incapable of review should the government see fit to present the basic information. *By presenting conclusions rather than facts, the government seeks to avoid both the necessity of prior judicial review, and the possibility of any realistic balancing of interests by this Court,* should such a balancing be found permissible. The Fourth Amendment ought not be rendered a nullity.

c. Nor May the Government Bootstrap Itself into the Foreign Intelligence Exception with Unsubstantiated Insinuations.

The government argues that national security surveillance of domestic groups is "so interrelated" with surveillance of foreign intelligence operations that the former must come within the exception created for the latter.[26] There are two responses to this line of argument.

(1) *The government is attempting to bootstrap itself into the foreign intelligence exception.* Although the sealed exhibits now before the Court may contain startling revelations, nothing in the government's argument suggests any evidence from which it may reasonably be inferred that either Plamondon, or the organization whose phone was tapped, were in any way entwined with the intelligence operations of unfriendly foreign powers. Certainly neither the fact that 521 calls went out of the country, nor that 431 calls dealt with "foreign" subject matter constitutes such evidence.[27] It should be remembered that Mr. Plamondon and those of his persuasion have opposed the Administration's *foreign policies.* In particular, it is common knowledge that he and other young radicals have opposed the military draft. Many draft resisters and other dissatisfied Americans now reside in Canada, which is a foreign country.[28] Thus, it is entirely possible[29] that a great number of

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[26] Brief of the United States, pp. 29-34.

[27] Brief of the United States, pp. 30-31, n. 13.

[28] It should be noted that the large Canadian city of Windsor, Ont., is less than fifty miles from Ann Arbor; and that the population centers of Ontario are within range of a cheap phone call from all of the major cities in the northern United States.

[29] Here we must speculate as the exhibits are sealed.

those 521 calls out of the country involved nothing more sinister than calls to expatriot friends or discussions with foreign groups about the mail (or even the repatriation) of United States prisoners of war. Likewise, whenever two people discuss foreign affairs, the War in Viet Nam, or the international monetary situation, they may be said to have dealt with a "foreign subject matter." Thus, it is entirely possible[30] that a great number of those 431 calls consisted of nothing more sinister than constitutionally protected discussion of current events.

Moreover, even if the government can reveal cooperation between domestic radical groups and individuals abroad, they have not necessarily established any dangerous interrelation with foreign spies. To suggest that such a relation is necessarily established is to engage in guilt by association. Mr. Justice Douglas has written:[31]

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[30] Here, again, we must speculate as the exhibits are sealed.

[31] Wm. O. Douglas, *op. cit.*, at 372. Judge Keith, below, put also the matter no less eloquently:

> "An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutionnal privileges annd immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions.
>
> "The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.
>
> "In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our exist-

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"Guilt by association is a dangerous doctrine. It condemns one man for the unlawful conduct of another. It draws ugly insinuations from an association that may be wholly innocent. In June 1945, the Supreme Court stated the American philosophy concerning this concept:

> ' . . . Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of communism. An individual who makes contributions to feed hungry men does not become 'affiliated' with the communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities.'" (quoting the *Bridges* case).

It is indeed dangerous to engage in guilt by association—to darkly insinuate, without good evidence or independent

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ing form of government. If democracy as we know it, and as our forefathers established it, is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government' (see affidavit of Attorney General), cannot be, in and of themselves, a crime. Such attempts become criminal only where it can be shown that activity was/is carried on through unlawful means, such as the invasion of the rights of others by use of force or violence."

judgment, that domestic radicals and foreign spies keep such close company that they are indistinguishable; then to *assume* they are indistinguishable; and thence conclude that they deserve identical treatment.

(2) *Even assuming arguendo, that domestic radicals are "interrelated" with foreign agents, this case does not fall within the foreign intelligence exception.* The so-called foreign intelligence exception to the Fourth Amendment is, so the government would have it,[32] based on the inherent powers of the President over foreign affairs or as Commander-in-Chief.

But the government's reliance on *Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) and the other foreign affairs cases is misplaced. In the very passage of *Waterman*, quoted in the government's brief,[33] the court makes it clear that they have in mind the foreign, as distinct from the domestic area, 33 U.S., at 111:

> "[T]he very nature of executive decisions as to *foreign policy* is political, not judicial." (emphasis supplied).

More importantly, in *Waterman* the Court was concerned only with the nature of delegated Presidential power over air carriers, which had no First or Fourth Amendment implications. By contrast, this case poses very serious threats to both Fourth and First Amendment freedoms. As we have seen, the standards and approach to such commonplace administrative questions as airline rates, are entirely out of place where serious Fourth and First Amendment

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[32] Brief of the United States, pp. 15 et seq.

[33] Brief of the United States, p. 32.

issues are raised.[34] *United States v. Clay*, 430 F.2d 165 (CA 5, 1970), relies on *Waterman* and is therefore distinguishable.

Nor may the government properly rely on powers inherent in the Commander-in-Chief. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) settles this point. Although the President was claiming a threat to national security in a war-time situation, this Court denied the Commander-in-Chief the authority to seize the steel mills. As Mr. Justice Jackson's concurrence makes clear, there is a world of difference between the President's plenary power over the armed forces in theaters of war, and his constitutionally limited power in internal affairs, 343 U.S. 643-4, 646:

> "There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and inhabitants . . . military powers of the Commander in Chief were not to supersede representative government of internal affairs . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."

Totten v. United States, 92 U.S. 105 (1875), suggests nothing to the contrary. *Totten* involved a Court of Claims case brought by one of President Lincoln's spies to recover expenses incurred while abroad in the Confederacy. Unsuprisingly, this Court held that the President had the

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[34] *U.S. v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936) involved only Presidential power to embargo munitions exports, and is distinguishable on similar grounds.

authority to dispatch spies into the territory of the enemy. By contrast, the instant case involves sending spies abroad in our own territory to spy on our own citizens, without any independent judicial determination that those citizens are about to engage in "terrorist tactics," much less civil war.

While the foreign intelligence exception perhaps allows the President to send spies abroad, or to spy on foreign nationals in the Unitel States, it does not allow him unilaterally to decide *in peacetime* that *domestic organizations of United States civilians* are exempt from the protection of the Fourth Amendment.

d. Nor do the Years of National Security Surveillance Before Katz Create any Exceptions to the Fourth Amendment.

The government implies that the fact of thirty years of unchecked national security surveillance established their right to continue such surveillance.[35] There are two responses:

(1) *It is fallacious to infer an "ought" from an "is."* Since at least 1739, when David Hume brought the matter to our attention, the western world has known that one may not logically infer that something *ought* to be the case from the mere fact that something *is* (or has been) the case.[36]

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[35] Brief of the United States, p. 18.

[36] David Hume, A TREATISE OF HUMAN NATURE (Clarendon edition, 1888), Book III, Part I, Section 1, at pages 469-70:

"I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary

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For if something *is* (or has been) the case, is it always logically posible that it *ought not* to be the case any more. The government neglects this elemental logical point when they seek to imply that, just because the Attorney General has been conducting national security surveillances for thirty years, he ought to be allowed to continue to do so. It is logically possible that he *ought not* be allowed to continue to do so.

(2) *Surveillance practices before Katz v. United States, 389 U.S. 347 (1967) are no evidence of constitutional permissibility today.* Before *Katz* came down in 1967 the line of cases beginning with *Olmstead v. United States*, 277 U.S. 438 (1928), contained the basic law on the constitutional permissibility of electronic surveillance. However, as Mr. Justice Harlan recognized in his concurrence, 389 U.S. at 362 n., this line of cases was finally overruled by *Katz*.

Although the government's tradition of national security surveillances and their stock memoranda is impressive, they are not the point. *Practices and administrative interpretations under Olmstead et seq., are absolutely worthless*

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> way of reasoning, and . . . makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that this not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality . . . "

now that Olmstead has been overruled. Since *Katz* overruled *Olmstead,* the *only* practices and administrative interpretations that are relevant to this case are those that have taken place since *Katz* came down in 1967, but the government offers none.

2. NO OTHER MEANINGFUL SAFEGUARDS HAVE BEEN SUGGESTED BY PETITIONER.

a. Approval by the Attorney General Offers no Protection.

The government suggests that we will be protected against abuse because the Attorney General will apply the same standard in authorizing national security surveillance as Congress provided in the Omnibus Crime Control Act of 1968.[37]

As we have seen, it is elemental that, if the Fourth Amendment means anything, it means that a law enforcement official may not judge his own case. *Coolidge v. New Hampshire,* 20 L.ed.2d 564, 573 (1971); *Johnson v. United States,* 333 U.S. 10 (1948). In that the Attorney is the law enforcement officer primarily responsible for seeing that bombings and other "terrorist activities" do not threaten the national security,[38] it follows that he may not sit in judgment the legality of eavesdropping aimed at uncovering just those threats.

Whether he promises to impose a strict or loose standard is not to the point. He is an interested party. He is paid to be suspicious in these matters. Not only is he a law enforcement officer. He is the chief law enforcement

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[37] Brief of the United States, p. 20.

[38] Brief of the United States, pp. 19-20.

officer of the Federal Government, and as such the man directly responsible for ferreting out subversives. Thus, as such he cannot sit in judgment, whatever the standard. An independent magistrate must decide the issue, lest the independence of the judiciary lose its meaning.

b. Fact that Attorney General May be Answerable, Through President, to the People is no Protection.

(1) *The People will have no way of knowing about national security surveillances.* The government would have both the existence and content of these surveillances kept absolutely secret. If there is no public disclosure, public opinion cannot be a check on abuse of these surveillances.

(2) *The danger that the President may be answerable to the People is the very reason for the Fourth Amendment and approved by an independent judiciary.* The Bill of Rights was designed to protect individual rights against tyranny of the majority. The same is true of the independent judiciary. In this respect they are anti-majoritarian. Thus, the very answerability of the President and Attorney General means that they might sacrifice individual rights in the face of strong majority opinion. Therefore, such officers are inappropriate as ultimate guardians of basic liberties.

c. After-the-Fact Judicial Review for Arbitrariness is no Protection.

The government assures us that "if the Attorney General should ever abuse his authority in authorizing a surveillance, *i.e.*, if the subject of surveillance *bore no reasonable relation* to national security, the courts could correct the situation."[39]

As we have already shown, independent judicial review must precede the surveillance to be constitutionally adequate under the Fourth Amendment. But even assuming *arguendo* that this surveillance is exempt from the warrant requirement, judicial review for arbitrariness would be inadequate. Invasion of privacy is something that cannot be undone. The very reason for the warrant requirement is that privacy cannot be adequately protected by *post facto* review. But even if *post facto* review were somehow adequate generally, review merely for arbitrariness is worthless. The standard is so weak as to render such a review a mere palliative, a munificent bequest in a pauper's will. But, as a practical matter, it would be impossible for a private citizen to meet even such a weak standard. To show arbitrary conduct one would have to have shown that the surveillance bore no reasonable relation to national security. However, even if "national security" were not such an impossibility vague phrase, one could never meet his burden as a practical matter. The Attorney General has a monopoly on the information needed to show a lack of relation to national security. This information is secret, and protected by the Executive privilege. In practical fact, this control would be illusory. To be effective judicial re-

[39] Brief of the United States, p. 35, emphasis supplied.

view must occur before the surveillance when the government has an incentive to produce their information, and before an independent magistrate who can deny the petition if adequate information is not produced.

II.

IN THE ABSENCE OF MEANINGFUL SAFEGUARDS, THE DANGER OF ABUSE IS CONSTITUTIONALLY INTOLERABLE.

If the government is granted what they claim, an area within which they may eavesdrop while practically and legally immune from any effective scrutiny or control, then there will be absolutely no way to check abuse. *For if one such area exists, then no other area can be safe.* To justify abusive conduct, one need only use the time-honored common law maneuver of redescribing a troublesome case so that it fits within the inherently vague category "national security," thereby expanding both your power and the category at one stroke.

This enterprise will be particularly easy in the area of national security for, as petitioner repeatedly stresses,[40] the facts in this area are always detailed and complex, the inferences always subtle. The more complex and detailed the facts, the subtler the inferences, the easier the abusive redescription.

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[40] Brief of the United States, pp. 7, 25.

A. The Technological Sophistication of Modern Electronic Eavesdropping Itself Raises Grave Doubts About the Ability of Even the Attorney General to Detect or Control Abuse of Surveillance.

The Court need not be reminded of the incredibly high levels of sophistication which the technology of electronic surveillance has recently attained.

But such powerful technology can itself pose a threat to democratic freedoms. As Max Weber has observed:[41]

> "The question is always who controls the existing machinery and such control is possible only in a very limited degree to persons who are not technical specialists."

When it comes to electronic surveillance of radicals and other threats to the national interest, the experts all work at the Federal Bureau of Investigation. But the approvals and the protections against abuse, we are told, will come from a man trained only as a lawyer, the Attorney General. If Weber's observation has any merit, it is reasonable to expect the Attorney General will have difficulty detecting, much less controlling, any abuse that may occur because of overreaching by the technical experts.[42] The true merit of Weber's point is amply illustrated by the recent history which follows:

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[41] Max Weber, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION, A. M. Henderson & T. Parsons, eds., (Oxford ed., 1947) at 337.

[42] Indeed, one journalist suggests this is already true. V. Navasky, KENNEDY JUSTICE (1971) at p. 32 writing about Robert Kennedy's tenure as Attorney General:

> "In the war against crime the technical specialists were the technical surveillance specialists. *Nobody not in the business had*

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B. Recent History Indicates that the Danger of Abuse is Substantial.

1. THE F.B.I. HAS WILLFULLY DISREGARDED THE REQUIREMENT OF PRIOR ATTORNEY GENERAL APPROVAL.

Consider, for example, the case of Martin Luther King, Jr. President Johnson issued a directive on June 30, 1965, expressly prohibiting all wiretapping without the specific approval of the Attorney General.[43] This was un unmistakable clarification of what was considered standard policy.[44] We must presume that the F.B.I. and all its agents were aware of President Johnson's directive. Ramsey Clark has stated publicly that he never authorized a tap on Martin Luther King's phone from October 3, 1966, when he became Attorney General, until mid-January 1969:[45]

> "Mr. Hoover repeatedly requested me to authorize F.B.I. wiretaps on Dr. King while I was Attorney General. The last of these requests, *none of which was granted;* came two days before the murder of Dr. King." (emphasis supplied).

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> *any idea what was going on — and so the question of whether Kennedy controlled the electronic eavesdroppers was irrelevant. It was never raised.* As Henry Ruth, who served in the organized-crime section at the time, reminisces, "You look back and you feel stupid, 'We'd get furious because we'd propose an investigation and they'd say, 'There's absolutely nothing there.' *Now* I know what this meant—either they knew from bugging that there was nothing there, or they knew that whatever *was* there was tainted—it couldn't be used as evidence in court because it was the result of a bug." (Emphasis supplied)

[43] V. Navasky, *op. cit.*, at 139.

[44] Letter from J. Edgar Hoover to Rep. H. R. Gross of December 7, 1966, reprinted in Navasky, *op. cit.*, at 449.

[45] V. Navasky, *op. cit.*, at 140.

We must presume he is telling the truth. Nevertheless, an F.B.I. agent admitted in a June 1969 hearing in the Cassius Clay case, that he has been assigned to conduct surveillance of Dr. King's phone until May 1965, but that he understood that *the tap was continued by the F. B. I. until a few days before King was assassinated.* As it cannot easily be assumed that an F.B.I. agent is ever misinformed when he makes a statement in open court, the only possible conclusion is that the F.B.I. intentionally broke the law by ignoring both the Attorney General and a specific Presidential directive.

The King case is a clear indication of the spirit with which the law-enforcement experts at the F.B.I. approach the requirement of prior Attorney General approval. As Courtney Evans, the liaison agent from the F.B.I. to Attorney General Kennedy, so succinctly put it:[46]

> "Any law enforcement officer will tell you it is an accepted principle of law enforcement to do what has to be done in the best interests of law enforcement at the time you are doing it."

In simpler terms, the men who operate and understand electronic surveillance equipment are, by F.B.I. precept, above the law.

2. EXPERIENCE INDICATES THAT PRACTICALLY ANYONE CAN BE REGARDED AS A FIT SUBJECT OF NATIONAL SECURITY SURVEILLANCE.

The Dr. King experience, again, provides fresh historical evidence of the dangers of abuse inherent in the use of a vague category like "dangerous to national security."

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[46] *Ibid.*, at 95.

A recent journalistic study of the Kennedy Attorney Generalship indicates that the original surveillance of Dr. King occurred, not because he was suspected of plotting sabotage, but because the supporters of the Civil Rights Bill wanted to protect both Dr. King (and thus the legislation) from allegations that he was being influenced by known subversives.[47] As Mr. Katzenbach relates the episode:[48]

> "There was some reason to believe that known subversives were making efforts to influence Dr. King's movement and the question was how to deal with that, how to confirm whether they were or not, and under these circumstances, really as much for the protection of Dr. King as for any other reason, and not because of any suspicion or feeling that Dr. King himself was in any way subversive or disloyal, Mr. Kennedy authorized a tap."

So it seems that at least one Attorney General of recent times has interpreted "dangerous to national security" to include anyone who is potentially subject to smear tactics, and may thereby endanger an important piece of legislation. Such an interpretation has a frightening sweep. It includes practically every politically prominent American, whatever his position on the political spectrum.

Thus, recent experience shows that in the absence of the Fourth Amendment safeguards the Attorney General cannot be relied upon to control either the F.B.I. or himself.

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[47] For a complete account see V. Navasky, *op. cit.*, pp. 135-155.

[48] Quoted in *ibid.*, p. 149.

C. The Government's Own Brief is Ample Evidence of Danger of Abuse, Absent Fourth Amendment Safeguards.

1. TO PERCEIVE ABUSE ONE MUST FULLY APPRECIATE THE DIFFERENCE BETWEEN WHAT IS THE CASE AND WHAT OUGHT TO BE THE CASE.

It is impossible to recognize abuse of authority, even when directly confronted with an example, if one does not fully understand the difference between what the current practices, policies and institutional arrangements *are*, and what they constitutionally *ought to be*. To uncritically identify the current set of policies with the ideal government contemplated by the Constitution, is to reveal a lack of conceptual tools needed to spot failures to live up to the Constitution. If one sees no difference between the real and the ideal, one will be unable to see when present policies are unconstitutional, or otherwise out of step with the basic values on which a democracy rests. This is a dangerous inability, as this Court saw in *United States v. Robel*, 389 U.S. 258, 664 (1967):

> "For almost two centuries, our country has taken a singular pride in the democratic ideals enshrined in its Constitution . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."

The government's brief demonstrates just such a dangerous inability. First, consider their argument that thirty years of national security eavesdropping on the citizenry somehow *justifies* what was done in this case. Not only is their logic faulty,[49] but the argument assumes that merely

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[49] See above, p. 23.

because these activities have been carried they embody our constitutional ideals. Nothing could be further from the truth. If this were the case, orderly social progress would cease, and democracy stagnate. Some activities of our officials may be better or worse than others, but it is dangerous in the extreme to infer that *because* something is official policy it can *ipso facto* be identified with the requirements of the Constitution and democracy.

Second, consider the language used in their brief. The Solicitor General sides indiscriminately back and forth between the need to preserve "society"[50] and the need to preserve the existing system of government, i.e. existing governmental policies. Although the distinction between these two is crucial, he does not seem to have appreciated it. For instance, we are told that the President has the duty to "defend the Constitution and the government created by it."[51] But what happens if the government acts contrary to the Constitution, as Respondents argue here? In that case, the President's clear duty is to the Constitution, not to the acts which abuse it. This is no less true if adherence to Constitutional ideals endangers the security of unconstitutional policies or institutions. The controlling duty is the Constitution. The President only has a duty to defend existing policies only *as long as* they are constitutional. Indeed, if the policy in question is unconstitutional he has an affirmative duty to attack it. The President's duty to defend policies and institutions which are admittedly constitutional is not to the point in this case. Here the is-

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[50] In the sense of "social organization," see John Locke, SECOND TREATISE ON CIVIL GOVERNMENT, reprinted in E. Barker, ed., SOCIAL CONTRACT (Oxford ed., 1968). "Society" is thus distinguished from "government," the latter being the particular existing institutional organization.

[51] Brief of the United States, p. 15.

sue is *whether* certain existing policies are constitutional. If one automatically conflates the Constitution and the government, that issue is easily missed.

We are told that "a fundamental right of any society is to preserve itself and to maintain its government as a functioning and effective organism."[52] To be sure, a society[53] has the right to preserve itself and its government. But the President is not society. He is just the fiduciary of society. The only functioning and effective government which he has any right to preserve is a *constitutional* government, i.e. a government in accord with the will of society. The only policies which he has any right to preserve are *constitutional* policies. The right of society to maintain its constitutionally chosen government is not before this Court. When the government suggests that it is, they reveal an inability to distinguish between themselves and the authority of the People.[54]

Again, we read "the President must protect the government/and thereby the society for whose benefit it exists

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[52] Brief of the United States, p. 15.

[53] In the Lockean sense, see above.

[54] This mistake is made repeatedly, e.g., we are told that the duty of protecting "the existing system" is implicit in the "responsibility for insuring [the viability of] our system of government," Brief of the United States, p. 15. But the former is only implicit insofar as the existing system is constitutional, which is the point here at issue. In Attorney General Mitchell's affidavit, Brief of the United States, p. 3, he speaks of the need to protect the nation from attack on "the existing structure of the government." At p. 14, the Solicitor General again asserts that the issue here is the "protection of the fabric of society itself" and the "existence of an organized society." Perhaps so, but only insofar as the government is trying to rend the fabric of the Fourth Amendment.

. . . "[55] But protecting the government is only protecting society insofar as the policies are being protected are constitutional. If they are not, then protecting the policies is attacking society. By protecting the existing government one does not thereby automatically protect society. The real subversive is the man who protects the existing government without ever considering the possibility that these officials may be doing something unconstitutional.

If the government is unable to appreciate this elemental distinction when preparing a brief to the Supreme Court of the United States, we hesitate to imagine what happens in the hustle and rush of everyday law enforcement. Our constitutional liberties ought not hang by so fine a thread.

2. GOVERMENT'S RELIANCE ON PAST PRACTICE.

The government's attempt to use past eavesdropping practices to establish their constitutional claim is itself the best evidence of their willingness to expand any "national security" beyond all limits.

As was argued above, because *Katz* overruled the *Olmstead* line of cases, past eavesdropping practices under *Olmstead* establish nothing about a constitutional claim being made under *Katz*. This being the case, all this past practice really establishes is an interpretation of Section 605 of the Communications Act of 1934. Thus, what the government is trying to do in this case is argue that a construction *of a statute* by past practice establishes a *constitutional* exception to the Fourth Amendment. If the government can so easily infer exceptions to the Consti-

[55] Brief of the United States, p. 18.

tution from practices under a statute, it should be simplicity itself to infer the right to eavesdrop on whomever they please from the right to eavesdrop on 'dangers to the national security."

III.

THE ONLY HOPE OF PREVENTING AND CONTROLLING ABUSE IS TO ADHERE TO FOURTH AMENDMENT SAFEGUARDS.

The only effective safeguards against abuse of electronic surveillance are those provided by the Fourth Amendment: (1) approval of an independent magistrate before surveillance begins; and (2) adherence to the disclosure requirements of *Alderman v. United States,* 394 U.S. 165 (1969).

A. Approval of an Independent Magistrate Before Surveillance Begins.

Difficult as it may sometimes be to control abuses of electronic surveillance, the Constitution requires that we try. For the courts to leave the field merely because abuses will be difficult to detect and correct is to sanction official abuse by default. As early as *Weeks v. United States,* 232 U.S. 383, 390 (1913) this Court recognized that such a course is unthinkable:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, *should find no sanction in the judgments of the courts, which are charged at all times with the support of the Con-*

> *stitution*, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (emphasis supplied)

Of course, a clear constitutional requirement of prior approval by an independent magistrate will not guarantee that the F. B. I. and the Attorney General will not abuse their authority. But no ruling of this Court ever guarantees *any* result in that sense. Were such a guarantee required there could be no rule of law.

1. SUCH REVIEW DOES NOT DENY THE AUTHORITY OF THE ATTORNEY GENERAL TO DEFEND SOCIETY, IT MERELY CONTROLS THE METHODS USED.

The government would have us believe that any attempt to observe the prior judicial approval requirement of the Fourth Amendment necessarily denies the authority of the Executive to defend the Constitution. We are told that the possibility of abuse is "not a valid basis for denying the Attorney General the authority" to use surveillance in defense of the national interest.[56]

However, no one has ever asserted that the Attorney General is without authority to conduct electronic surveillances in defense of the society. *The issue here is not whether he has such authority, but whether he must observe certain procedures in the exercise of that authority.* Respondents question not the end which the government seeks, but the means by which they seek it.

Mr. Justice Douglas put it well:[57]

> "The Almanac of liberty . . . is filled with episodes where the *means* are outlawed, though the

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[56] Brief of the United States, p. 35.

[57] Wm. O. Douglas, *op. cit.*, at 178.

> *ends* sought are worthy. The greatest battles for liberty indeed have been fought over the procedures which police and prosecutors may use."

The Sixth Circuit Court of Appeals saw the point equally clearly when they wrote:[58]

> "[I]t should be noted that the Fourth Amendment's judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of electronic surveillance. What the Fourth Amendment does is to establish the method they must follow."

2. NOR CAN THE GOVERNMENT ARGUE THAT THE JUDICIARY IS INCAPABLE OF SUCH REVIEW.

The linchpin of the government's argument against prior judicial approval of national security surveillance is the alleged inability of the judiciary to do the job:[59]

> "[N]ational security surveillance cases, however, . . . generally [involve] a large number of detailed and complicated facts whose interrelation may not be obvious to one who does not have extensive background information, and the drawing of subtle inferences."

It seems that because the judiciary will not have extensive background information, and because courts lack the mental ability to draw subtle inferences, judicial review should not be required.

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[58] *United States v. United States District Court*, see Appendix to Respondent's brief.

[59] Brief of the United States, p. 25.

The obvious response is that courts handle detailed and complicated facts daily, and regularly make very subtle inferences. Any common-garden-variety anti-trust case involves facts of staggering detail and complexity. Nevertheless, the government shows no reluctance to bring anti-trust litigation before the courts. As for the judiciary's ability to draw subtle inferences, it is presumptive in the extreme for the government to tell this Court, or other judicial officers, that they lack the necessary intelligence.

Nor is it possible to respond that the inferences in the national security area are qualitatively different. Just last June the government eagerly brought before the courts (what they regarded) as a very grave issue of national security, *New York Times Co. v. United States*, 403 U.S. 713, 29 L. ed. 2d 822 (1971). The facts were complex, the inferences subtle. Nevertheless, the government did not hesitate. Indeed, the federal courts have traditionally had no trouble handling the most difficult and sensitive national security cases, whether they arise from the seizure of steel mills in war-time or from nuclear blasts under Amchitka.

If there were really any doubt about the ability of the federal bench to understand these matters, it would be an easy matter to direct the requests to some judicial officer who has the necessary experience and intelligence. Many a distinguished federal judge has served as a prosecutor, attorney general, or in some other law enforcement capacity. Moreover, if permission to eavesdrop is denied by some "dull" magistrate, nothing prevents the government from adding a small piece of information to their case and reapplying before some other judicial offcer.[60]

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[60] It is interesting to note a curious omission in the government's presentation. If judges lack ability as the government argues, there must be instances where the government has been refused permission. Yet they cite no instances where magistrates have refused even Omnibus Crime Control Act warrants.

In reality the government's argument goes as follows: "In these cases there is never a reasonable basis on which an independent judicial officer can base his permission. Therefore, an independent judicial officer lacks the ability to do his job. Therefore, he ought not be allowed to pass on these surveillances." But this would prove too much. A law enforcement officer can always argue that the reason there is no basis to approve the surveillance is that the magistrate is too stupid and the facts too complicated. Rather than erase the Fourth Amendment, the government adds: "And national security is a special case." However, they have not given this Court any particular reasons to believe this *ipse dixit*. Nor have they explained why all national security cases are beyond the ken of judicial officers. Surely there must be a straight-forward national security case occasionally.[61] One suspects the government of engaging in a "definitional stop."[62] That is, national security cases are special because the government defines national security cases as special. There all discussion must end.

B. Adherence to the Disclosure Requirements of Alderman.

In *Alderman v. United States*, 394 U.S. 165 (1969), Mr. Justice White made it clear that *in camera* review for "arguable" relevance was an insufficient safeguard of Fourth Amendment rights.[63] If an individual is to have

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[61] Indeed, the national security cases on which the government relies in their brief seem to have been handled adequately. Else why would the government rely on them?

[62] See H. L. A. Hart, CONCEPT OF LAW (Oxford ed., 1961).

[63] Disclosure was required "even though attended by potential danger to the reputation of safety of third parties or to the national security," 394 U. S. at 181.

any realistic chance of discovering whether or not the government has conducted illegal eavesdropping, he must see the record of surveillance. The trial court is in no position to do the job.

First, the court is never in a position to "place the transcript . . . of the surveillance alongside the record evidence and compare the two for textual or substantive similarities," 394 U.S. at 182. As suppression hearings occur before the main trial, the record evidence will always be limited.

Second, the court will not know what to look for. As Mr. Justice White puts it, 394 U. S. at 182:

> "[A] good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case."

At this point Justice White drops a very interesting footnote, 394 U.S. 183 n. 14:

> "In both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where in camera pro-

> cedures have been found acceptable to some extent."

This Court, then, carefully distinguished cases involving complex facts and difficult judgments from cases where *in camera* examination is acceptable. He goes on to quote *Dennis v. United States,* 384 U.S. 855, 874-5, (1966), a case involving communists in labor unions, for the proposition that, 394 U. S. 183 n. 14:

> "'[t]rial judges ought not be burdened with the task or the responsibility of examining sometimes voluminous . . . .testimony,' and . . . it is not "realistic to assume that a trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities."

Here, on the government's own showing, [64] the case "involves a large number of detailed and complicated" facts. Moreover, the inferences that must be made are 'subtle."[65] This being the case it is impossible to expect even the most conscientious judge, by himself, to see all the possible ways in which something might be "arguably relevant." Again, on the government's own showing,[66] the trial court "does not have the extensive background information" necessary. Thus, he is especially likely to pass over some "colorless" bit of information which will have special and vital significance to the defendant. In short, the very factors upon which the government relies to argue for an exception from judicial review before surveillance militate

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[64] Brief of the United States, p. 25.

[65] ibid.

[66] ibid.

for complete disclosure to the defendant after surveillance. [67]

Nor is it sensible to argue that Mr. Justice White meant, in the interests of administrative convenience, to relieve lower courts of the burden of sifting a voluminous record. The point, rather, is that the danger of an inadequate job being done by an individual trial judge is substantial, by far *too* substantial to meet Fourth Amendment requirements. Even if the concern were administrative convenience, the answer is to disclose to the defendant. Let *him* do all the work of sifting through volumes of records, rather than the court. *Alderman* makes no sense if read as an exercise of this Court's supervisory powers.

IV.

PALMER RAID PERIOD PROVIDES A CLEAR EXAMPLE OF HISTORY THE GOVERMENT WOULD DOOM US TO REPEAT.

Once before in this century the Attorney General has, in the name of protecting the national security against domestic subversives, laid claim to an area within which his "administrative" procedures would be exempt from the Bill of Rights. In the years from 1917 to 1921 the government accomplished the concerted, deliberate destruction

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[67] For a government to withhold the whole truth is never wise. "When the truth is buried underground, it grows, it chokes, it gathers such an explosive force that on the day when it bursts out, it blows everything up with it. We shall soon see whether we have laid the mines for a most far-reaching disaster of the near future." Emile Zola, *"J'accuse! . . . "*, reprinted in THE LAW AS LITERATURE (Simon and Schuster ed., 1966) at 237.

of the I. W. W.,[68] the first real industrial labor union. This was done in the name of administrative control of "alien" radicals. It culminated with the Red Raids conducted by Attorney General A. Mitchell Palmer in 1919-1920. These raids involved such flagrantly lawless and massive invasions of individual rights that a distinguished group of lawyers (including Felix Frankfurter and Roscoe Pound) denounced the Attorney General in these outraged terms:[69]

> "Under the guise of a campaign for the suppression of radical activities, the office of the Attorney General, acting by its local agents throughout the country, and giving express instructions from Washington has committed continual illegal acts. Wholesale arrests of both aliens and citizens have been made without warrant or any process of law; men and women have been jailed and held *incommunicado* without access of friends or counsel; homes have been entered without search-warrant and property seized and removed; other property has been wantonly destroyed; workingmen and working women suspected of radical views have been shamefully abused and maltreated. Agents of the Department of Justice have been introduced into radical organizations for the purpose of informing upon their members or inciting them to activities; these agents have even been instructed from Washington to arrange meetings upon certain dates for the express object of facilitating wholesale raids and arrests.

[68] International Workers of the World, or "Wobblies."

[69] R. G. Brown, Zechariah Chafee, Jr., Felix Frankfurter, Ernst Freund, Swinburne Hale, Francis Fisher Kane, Alfred S. Niles, Roscoe Pound, Jackson H. Ralston, David Wallerstein, Frank P. Walsh, Tyrell Williams, "To the American People—Report upon the Illegal Practices of the United States Department of Justice," (NY: American Civil Liberties Union, 1920).

A. In Relevant Respects, the Factual and Legal Claims Made by the Government in that Period are Strikingly Parallel to Those Made Here.

The history of the Palmer Raid period[70] presents an instructive and striking parallel to this case. Some twenty-six years before the Palmer Raids, the United States Supreme Court decided *Fong-Yue-Ting v. United States*, 149 U. S. 698 (1893). They held that deportation was merely an administrative process for the return of unwelcome and undesirable aliens to their own countries, not a punishment for crime. A few years later the Court decided *Yamataya v. Fisher*, 189 U.S. 86 (1903), the famous Japanese immigration case. The Court held that the Executive branch had sole and final authority to determine an alien's right to remain in this country, provided the alien was not "arbitrarily" deported, i.e. was allowed an administrative hearing. The court would not consider the fairness of the hearing, 189 U.S. at 100:

> "It is true that she pleads a want of knowledge of our language; that she did not understand the nature and the import of the questions propounded to her; that the investigation made was a 'pretended' one; and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts."

It was enough that the alien, unable to understand or speak English, might have brought the matter to the attention of the immigration officials, *ibid*:

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[70] The following discussion is based on Prof. Wm. Preston, Jr., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963), a publication of the Harvard University Center for the Study of the History of Liberty in America.

> "They could have been presented to the officer having primary control of such a case, as well as upon an appeal to the Secretary of the Treasury, who had power to order another investigation if that course was demanded by law or by the ends of justice."

As long as there was a hearing, the Court could perceive no ground for judicial "intervention, . . . none for the contention that due process of law was denied," 189 U.S. at 102. See also, *Pearson v. Williams,* 202 U.S. 281 (1906). Little did the Court suspect that by 1919 the Executive branch would be using these decisions as the justification for mass arrests, general searches, and *incommunicado* interrogations of anyone deemed dangerous and undesirable. As it turned out, what the Court had done was, in effect, to do what the government is asking this Court to do in the instant case—create an area, exempt from the Bill of Rights, within which the Executive branches' treatment of individual liberties will be secure from any scrutiny but its own.

Abuses developed slowly. In 1908 a thorough search revealed no deportable anarchist aliens. In the eight year period before the Palmer Raids only fourteen aliens were deported for radical beliefs.[71] From 1909 to 1912 a determined effort was made to silence the I.W.W. and their anti-capitalist rhetoric. It failed miserably. With the Bill of Rights supporting the Wobblies, there seemed to be no legal way to silence them. As one old farmer was reported to have complained, "You can't kill 'em; the law protects 'em."[72] In 1912 under pressure from the solid citizens of

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[71] ibid., p. 33.

[72] ibid., p. 43.

Southern California, President Taft pronounced the I.W.W. "lawless flotsam and jetsam," and promised "to take decided action."[73] However, a scrupulously careful examination by the Department of Justice failed to reveal sufficient evidence to sustain a criminal indictment. Because the Attorney General had yet to discover the usefulness of deportation as an anti-radical weapon, he regretfully concluded that there was no way to "show the strong hand of the United States," as Taft desired.[74]

Again in 1915, another federal investigation revealed no grounds for federal action.[75] As a general matter, before World War I the suppression of labor organizers was thus left to the States and to the vigilantes.

However, the threats of World War I changed matters. In the face of a rising nativist feeling, Congress abandoned the conviction that radicalism could be a home-grown phenomenon.[76] Shutting its eyes to the evidence of shocking industrial conditions Congress keyed its solution of domestic unrest to the mistaken theory that described current radicalism as a foreign import of the new immigration.[77] Then, as now, the tendency was to insinuate that domestic dissidents are "interrelated" with foreign ene-

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[73] ibid., p. 53.

[74] ibid., p. 54.

[75] ibid., p. 60.

[76] ibid., pp. 75, 83.

[77] ibid., p. 76. Evidence indicates that most workers joined the I.W.W. to make effective protest, rather than in support for their radical aims, ibid. p. 97.

mies, and then bootstrap to the conclusion that the Bill of Rights no longer applied.[78]

In 1917 Congress overrode President Wilson's second veto and passed a vague new immigration law, 39 U.S. Stat. 889:

> "Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy or the otherthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The Congress that passed this statute and amended it in 1918, like the Congress that passed the Omnibus Crime Act, was impatient with the procedures of the Courts. Congressmen did not want to determine the rights of anarchists and

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[78] ibid, pp. 76, 91, 100. During World War I the insinuations became less subtle. Consider the following headlines from the period: "Kaiser's Coin Pays for I. W. W. Sabotage," San Francisco *Chronicle*, Feb. 22, 1918, p. 1, col 3; "Bolsheviki Ship Brings Gold to Aid I. W. W.," San Francisco *Chronicle*, Dec. 24, 1917, p. 1, col. 8; "Bolsheviki and I. W. W.'s Planned U. S. Revolution," Indianapolis *News*, Feb. 21, 1919, p. 3, col. 1. Generally see Eldridge R. Dowell, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES (DaCapo edition, 1969), pp. 34-44; and at p. 36, "it is interesting to note that no case of an I. W. W. saboteur caught practicing sabotage or convicted of its practice is available."

This country has a long tradition of explaining dissent, unionism, and radicalism as the product of "foreign" influences. E.g., in *People v. Fisher*, 14 Wend. 9 (N.Y. 1835) a group of tailors were indicted for conspiring to injure trade and commerce. Judge Edwards lectured them as follows: "Every American knows, or ought to know, that he has no better friend than the laws, and that he needs no artificial combination [i.e., union] for his protection . . . *They are of foreign origin, and I am led to believe are mainly upheld by foreigners* . . . ". (emphasis added).

other radicals "by the long slow process of courts." As one representative said, "A long-delayed snail-paced" trial would only encourage radicals "to ply their trade instead of making an example of them."[79] Nor was Congress concerned that the "alien" involved may have resided in the United States for years.[80] As Prof. Preston summarizes the official feeling at the time: "If repression was the aim, then a non-criminal, administrative procedure was far more efficient [than the courts], and gave . . . officials great latitude in defining guilt."[81]

Before applying the 1917 Act, however, Secretary of Labor Wilson ordered a full-scale investigation of the I.W.W.'s literature and organic documents. This examination revealed "no lawless purpose," as did a similar investigation in 1918.[82] The Secretary ordered that his inspectors thoroughly substantiate personal guilt before requesting a warrant of arrest. Warrants would issue, the Secretary ordered, only after an exhaustive inquiry into the alien's beliefs, teachings, and actions. Indeed, the Secretary insisted on a standard of *personal* guilt as exacting as that in judicial proceedings.[83] Even before Sec. Wilson's action, the immigration officials had decently stiff

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[79] ibid., p. 83.

[80] ibid., p. 83. Consider the comments of Rep. Slayden of Texas:

> "Now I would execute these anarchists if I could, and then I would deport them, so that the soil of our country might not be polluted by their presence even after the breath had gone out of their bodies. *I do not care what the time limit is.* I want to get rid of them by some route . . . or by execution by the hangman. It makes no difference to me so that we get rid of them."

[81] ibid.

[82] ibid., pp. 101, 189.

[83] ibid., p. 102.

formal standards to follow. Under the Departmental rules, e.g. an arrest warrant was only issued when an inspector had made out a prima facie case, and accompanied the application by "some substantial supporting evidence." Telegraphic application for a warrant was only permitted "in case of necessity" or "when some substantial interest of the government would thereby be served.[84] Thus, initially the Secretary was cautious about his interpretations. As in the instant case, an effort was made to create and impose an administrative substitute for probable cause.

However, these administrative safeguards died young. By March 1918 the commissioner general was of the opinion that Congress:[85]:

> "[a]lso intended to reach the passive and insidious forms [of radical activity] . . . as the only assuredly effective means of curing the active forms; in other words intended to reach the word as well as the deed, and in some respects, *to reach* the underlying thought as well."

Because of pressure from the lower echelons,[86] the standard rapidly went from personal guilt to "evil thoughts" or membership in a group known for their subversive ideas, to the joy of state prosecutors and employers.[87] The Supreme Court's decisions were interpreted to give the Executive authority to deport aliens on the grounds of expediency, whenever their presence was "deemed incon-

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[84] ibid., p. 14.

[85] ibid., p. 84.

[86] ibid., p. 102.

[87] ibid., p. 100: "Prosecuting attorneys and employers also looked upon deportation as the most flexible and discretionary weapon available for their attack upon radical labor agitators. Proof of individual guilt was the great stumbling block in labor disturbances."

sistent with the public welfare.[88] What standards remained at the Cabinet level never were applied in practice. The subordinates were trained in law enforcement. They had difficulty making fine theoretical distinctions, much less applying them.[89]

Thus, when a man said he was opposed to capitalism, they took him to be an anarchist. In practice the standards for arrest and deportation in I. W. W. cases became about as loose as any the immigration bureau inspectors could devise:[90] e.g., having the appearance and attitude" of an I. W. W., even though not a member; sympathetic association with anarchists, the I. W. W. or similar groups; "living off summer's earnings" (a characteristic typical of harvest and lumber workers in the off-season); "an abnormal head which indicates criminal propensities;" a "predilection for agitation;" or a tendency to "spread radical propaganda.' Nor could formal pronouncements by the Secretary of Labor restrain the abuse:[91]

> "In theory, the wayward Bureau of Immigration was only carrying out the desires and decisions of the Secretary of Labor. It had no independent policy-making authority. In practice, the bureau had captured control of deportation, ignored the interpretation of Secretary Wilson and turned the superior department officials into submissive rubber stamps."

Despite the best intentions of the Secretary, the privileged area created by the Court in 1893 had become a monster by 1920.

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[88] ibid., p. 11.

[89] ibid., p. 188.

[90] ibid., pp. 178-9.

[91] ibid., p. 222.

In the government's enthusiasm to stamp out the I.W.W. they resorted to a number of tactics. In September 1917 Bureau of Investigation agents simultaneously raided I. W. W. headquarters, locals, and residences throughout the nation in an effort to get enough information for criminal charges.[92] After the leaders of the I.W.W. were indicted and under trial for criminal conspiracy, the government conducted a concerted program to cut off funds for the defense effort. The Postmaster General banned I.W.W. literature from the mails.[93] The ban included not only requests for contributions to the defense of the Chicago prisoners, but even the blank contribution forms themselves.[94]

The tactics also included the general search. Anxious to find any mail that might contain contributions, one inspector's search warrant contained the following particular description: "5,000 envelopes bearing U.S. stamps and indicating proper payment of postage thereon."[95] Officers were authorized to seize material not covered by such warrants if the letters in question "appear . . . to be part of the general scheme and propaganda of the I. W. W."[96] Such searches and seizures are so general as to approach those effected by modern electronic surveillance. Of course, President Wilson's administration justified these searches as mere administrative procedures,

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[92] ibid., p. 118.

[93] ibid., p. 146.

[94] ibid. Even the I. W. W. resolution *against* sabotage was prohibited because it contained the word "sabotage." Certain literature was found to have "disloyalty unexpressed," or a "somewhat more audible undertone of disloyalty," p. 147.

[95] ibid., p. 148.

[96] ibid.

pursuant to the Executive's power to deport subversive aliens.

Ultimately the arrests began under the supervision of a young man by name name of J. Edgar Hoover, then head of the Justice Department's old General Intelligence Division. *Incommunicado* interrogations were favored. The government could thereby convict a man out of his own mouth, without the unfortunate necessity of exposing their undercover informers. Indeed, much of the illegal and abusive treatment given the prisoners may be traced to the official decision to protect undercover informers.[97] Thus, Mr. Hoover opposed counsel being present at the interrogation, for with counsel present the prisoner would not incriminate himself. The government then would be forced to blow their counter-espionage agents' cover at the very start of a promising career.

Again, in borderline cases where deportation seemed debatable, the government would resort to information from undercover informants. Since confidential information would not appear in the record, the alien would have no way of answering it. Prof. Preston summarizes: "Weak, technical cases were to become substantial, deportable ones on the secret word of undercover informants. With their reliability unquestioned, and their statements unchallenged, these agents would become the real arbiters of the immigration laws."[98] Similarly, in the instant case, the government seeks to keep secret the testimony of an undercover electronic informant. Without disclosure there can be no way to judge the legality and worth of the surveillance. Again, the government seeks to be the sole arbiter of the Bill of Rights.

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[97] ibid., p. 221.

[98] ibid., p. 214.

It is said of the young Mr. Hoover that he "did not think of [the] program as either autocratic or outrageous. [H]e simply carried traditional immigration practices to a logical conclusion and . . . expected good results."[99] We respectfully submit that democracy in the United States cannot afford another round of such "good results."

CONCLUSION

Wherefore, the judgment of the Court of Appeals should be affirmed.

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[99] ibid., p. 220.